

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOSEPH-HARVEY E.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C21-5771 TLF

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his applications for disability insurance and supplemental security income (SSI) benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

A. Whether the ALJ erred at step two of the sequential evaluation.

B. Whether the ALJ properly evaluated plaintiff's subjective symptom testimony.

C. Did the ALJ err by incorporating into the RFC some, but not all, of the plaintiff's limitations?

D. Did the ALJ err by finding plaintiff could perform other work at step five?

1 E. Whether the Court should remand for additional proceedings.

2 II. BACKGROUND

3 On October 3, 2017, plaintiff protectively filed a Title II application for disability  
 4 insurance benefits (DIB) and a Title XVI application for supplemental security income  
 5 (“SSI”), alleging in both applications a disability onset date of May 10, 2016.  
 6 Administrative Record (“AR”) 262-68. Plaintiff’s applications were denied upon official  
 7 review and upon reconsideration. See AR 74–92, 114-34. A hearing was held before  
 8 Administrative Law Judge (“ALJ”) Cynthia D. Rosa on November 16, 2020. See AR 46–  
 9 71. On December 18, 2020, ALJ Rosa issued a decision finding that plaintiff was not  
 10 disabled. AR 13–40. On August 24, 2021, the Social Security Appeals Council denied  
 11 Plaintiff’s request for review. AR 1–7.

12 Plaintiff seeks judicial review of the ALJ’s December 18, 2020 decision. Dkt. 12.

13 III. STANDARD OF REVIEW

14 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s  
 15 denial of Social Security benefits if the ALJ’s findings are based on legal error or not  
 16 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874  
 17 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a  
 18 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*  
 19 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted); *Woods v. Kijakazi*, \_\_  
 20 F.4th \_\_, No. 21-35458, 2022 WL 1195334, Slip Op. at 6 (9th Cir. April 22, 2022).

21 IV. DISCUSSION

22 In this case, the ALJ found that plaintiff the had the following severe impairments:  
 23 obesity, fibromyalgia, right knee osteoarthritis, migraine headaches due to occipital  
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1 neuralgia, major depressive disorder, generalized anxiety disorder, and chronic  
2 obstructive pulmonary disease with asthma. AR 18. Based on the limitations stemming  
3 from these impairments, the ALJ found that plaintiff could perform a reduced range of  
4 light work. AR 23. Relying on vocational expert (“VE”) testimony, the ALJ found at step  
5 four that plaintiff could not perform his past relevant work, but could perform other light,  
6 unskilled jobs at step five of the sequential evaluation; therefore, the ALJ determined at  
7 step five that plaintiff was not disabled. AR 32-33.

8  
9 A. Whether the ALJ Erred at Step Two of Sequential Analysis

10 At step two of the sequential evaluation, the ALJ must determine if the claimant  
11 suffers from any medically determinable impairments that are “severe.” 20 C.F.R. §§  
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii). An impairment is not considered to be “severe” if it  
13 does not “significantly limit” a claimant’s mental or physical abilities to do basic work  
14 activities. 20 C.F.R. §§ 404.1520(c), 416.920(c); Social Security Ruling (“SSR”) 96-3p.  
15 Basic work activities are those “abilities and aptitudes necessary to do most jobs.” 20  
16 C.F.R. §§ 404.1522(b), 416.922(b); SSR 85-28. An impairment is not severe if the  
17 evidence establishes only a slight abnormality that has “no more than a minimal effect  
18 on an individual[']s ability to work.” SSR 85-28; *Smolen v. Chater*, 80 F.3d 1273, 1290  
19 (9th Cir. 1996).

20 1. HIV and Neuropathy

21 Plaintiff first argues that the ALJ erred by failing to find at step two of the  
22 sequential analysis that plaintiff had the severe impairments of HIV and neuropathy.  
23 Dkt. 11, p. 5–7.

1 Here, the ALJ declined to find that plaintiff had the severe impairment of HIV and  
2 neuropathy, because even though plaintiff has been treated or evaluated for HIV  
3 infection, the overall record shows that plaintiff has only experienced transient and mild  
4 symptoms lasting less than a year and the symptoms are well controlled with treatment.  
5 AR 19.

6 Step two “is not meant to identify the impairments that should be taken into  
7 account when determining the RFC.” *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir.  
8 2017) (rejecting claim that ALJ erred after second hearing, where ALJ found  
9 new severe impairments but did not change RFC). An ALJ assessing a claimant's RFC  
10 “must consider limitations and restrictions imposed by all of an individual's impairments,  
11 even those that are not ‘severe.’” *Buck*, 869 F.3d at 1049 (citing Titles II & XVI:  
12 Assessing Residual Functional Capacity in Initial Claims, Social Security Ruling (“SSR”)  
13 96-8p. The RFC therefore “should be exactly the same regardless of whether  
14 certain impairments are considered ‘severe’ or not” at step two. *Id.* Thus, in many cases  
15 an error in not finding an impairment “severe” at step two is harmless. *See id.*; *Stout v.*  
16 *Comm’r Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

17 In this case, the alleged error is harmless because the ALJ considered HIV and  
18 neuropathy in determining plaintiff's RFC, and substantial evidence supports the ALJ's  
19 decision that no limitations relating to HIV or neuropathy should be included in the RFC.  
20 For example, the ALJ found that evidence suggests that plaintiff's HIV does not cause  
21 his laze (AR 28) and that Cheryl Einerson, ARNP, opined that plaintiff's HIV infection  
22 causes no functional limitations. AR 31. Plaintiff has not shown how the ALJ's step two  
23 consideration of neuropathy and HIV, and decision that these were non-severe  
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1 impairments, caused any harmful error. *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th  
2 Cir. 2017).

3 2. Degenerative Disk Disease of the Back, Chronic Fatigue Syndrome,  
4 Chronic Liver Disease

5 Plaintiff also argues the ALJ erred by failing to find at step two that plaintiff had  
6 the severe impairments of degenerative disk disease of the back, chronic fatigue  
7 syndrome, and chronic liver disease. Dkt. 12, pp. 6–7. The Commissioner argues that  
8 this was harmless error. The ALJ considered these impairments in determining the  
9 RFC, therefore the ALJ’s error was harmless. AR 22-23, 25-27, 29, 30. *Buck v.*  
10 *Berryhill*, at 1048-1049.

11 B. Plaintiff’s subjective symptom testimony

12 To reject a claimant’s subjective complaints, the ALJ’s decision must provide  
13 “specific, cogent reasons for the disbelief.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.  
14 1995) (citation omitted). The ALJ “must identify what testimony is not credible and what  
15 evidence undermines the claimant’s complaints.” *Id.*; *Dodrill v. Shalala*, 12 F.3d 915,  
16 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the  
17 ALJ’s reasons for rejecting the claimant’s testimony must be “clear and convincing.”  
18 *Lester*, 81 F.2d at 834. “[B]ecause subjective descriptions may indicate more severe  
19 limitations or restrictions than can be shown by medical evidence alone,” the ALJ may  
20 not discredit a subjective description “solely because it is not substantiated affirmatively  
21 by objective medical evidence.” *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th  
22 Cir. 2006).

1           1. Migraines and Anxiety

2           The ALJ discounted plaintiff's testimony about his migraines and anxiety because  
3 they were controlled by medication. See AR 20-21, 28. The ALJ also discounted  
4 plaintiff's assertions about his anxiety because the statements were inconsistent with  
5 objective medical evidence largely attributable to situational stressors. *Id.*

6           Plaintiff testified that he experiences 15 to 20 migraines a month, each one  
7 lasting anywhere from one to four days, and that he addresses them through  
8 medications and sleeping. AR 60-61. In a function report, plaintiff stated that his  
9 migraines cause "nausea, vomiting, blurry vision, and burning limbs," which prevents  
10 him from working. See AR 328.

11          As to his mental symptoms, plaintiff testified that social anxiety prevents him from  
12 working full time. AR 56.

13          Regarding the ALJ's first reason, "evidence of medical treatment successfully  
14 relieving symptoms can undermine a claim of disability." *Wellington v. Berryhill*, 878  
15 F.3d 867, 876 (9th Cir. 2017). Here, in discounting plaintiff's testimony about his  
16 migraines and anxiety, the ALJ pointed to treatment notes stating that plaintiff was doing  
17 well under his medication regimen. AR 558, 565-566 (Report by ARNP Lauren Wilhelmi  
18 dated 12-20-2018).

19          These treatment notes, related to plaintiff's anxiety, provide substantial evidence  
20 to support the ALJ's decision to discount plaintiff's testimony about how his anxiety  
21 prevents him from working. Although the ALJ provided other reasons to discount  
22 plaintiff's testimony regarding his anxiety, the Court need not consider whether those  
23 remaining reasons contained error. See *Carmickle v. Commissioner, Social Sec.*

1 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (citation omitted) (concluding  
2 “the ALJ’s decision finding [the claimant] less than fully credible is valid” despite some  
3 errors because the ALJ gave legally sufficient reasons to reject plaintiff’s testimony).

4       Regarding migraines, the Commissioner points to Dr. Hamburg’s note stating  
5 that plaintiff’s “headaches are controlled with current treatment plan.” AR 31; 1665. The  
6 Commissioner also points to the medical opinions of Dr. Staley, Dr. Hale, and Dr.  
7 Madsen because they do not mention any limitations relating to plaintiff’s migraines.  
8 Dkt. 13, pp. 9–10. But the ALJ may not discredit a subjective description “solely  
9 because it is not substantiated affirmatively by objective medical evidence.” *Robbins*,  
10 466 F.3d at 883.

11       Moreover, Dr. Madsen also found that plaintiff’s current treatment for his  
12 migraines has led to “some improvement” but his migraines remain “very disruptive at  
13 10-12 episodes per month with one hour to four days of incapacitation.” AR 551  
14 (Evaluation Report dated 8-25-2018). The ALJ’s decision to discount plaintiff’s  
15 testimony about his migraines on the basis that they were controlled with medication is  
16 not supported by substantial evidence, and the reasons given by the ALJ are not clear  
17 and convincing. Therefore, the ALJ committed error. *Dodrill v. Shalala*, 12 F.3d 915, 918  
18 (9th Cir. 1993) (ALJ is required to identify facts in the record demonstrating that plaintiff  
19 is in less pain than they claim).

## 20       2. Use of a Cane

21       Plaintiff also testified that he has “mobility issues” and “can’t stand straight,” and  
22 that he must use a cane every day. See AR 60-61. The ALJ discounted plaintiff’s  
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1 testimony because (1) no medical source prescribed the use of a cane and (2) it  
2 conflicted with plaintiff's daily activities. AR 22, 28.

3 The Ninth Circuit has held that an ALJ does not err in discounting a plaintiff's  
4 subjective testimony about the use of a cane when the device has not been prescribed.  
5 See *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002). Plaintiff points out that Dr.  
6 Staley, Dr. Hale, and Dr. Madsen have all commented plaintiff's use of a cane, but none  
7 have prescribed the device to plaintiff. See Dkt. 12, pp. 8–10. The record also does not  
8 include any other medical sources prescribing a cane for plaintiff, contrary to plaintiff  
9 testifying that Dr. Jeannette Aldous had assigned one. See AR 61, 132, 319-27. The  
10 ALJ has provided a valid reason, supported by substantial evidence, to discount  
11 plaintiff's testimony about the need for a use of a cane. The Court need not further  
12 analyze whether the ALJ erred in discounting plaintiff's testimony about the use of a  
13 cane because it was consistent with his daily activities. See *Carmickle*, 533 F.3d at  
14 1162.

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16 C. Whether the ALJ Erred with the RFC Determination

17 Plaintiff argues that the ALJ erred by failing to properly incorporate the limitations  
18 of the state agency consultants in the residual functional capacity (RFC) determination  
19 in light of the fact that she found their opinions “persuasive.” Dkt. 12, pp. 3–12; AR 29.  
20 Specifically, plaintiff argues that the ALJ should have incorporated the findings from the  
21 opinions that plaintiff: (1) is limited to sedentary work, (2) requires a cane, and (3) can  
22 only adapt to “routine changes.” Dkt. 12, pp. 3–12.

1 In evaluating the medical opinions, the ALJ found both the initial and  
2 reconsideration State agency opinions “persuasive” and explained that “the residual  
3 functional capacity accounts for limitations identified by these consultants.” AR 29. The  
4 state agency consultants in the record include: Dr. Brown (AR 89), Dr. Staley (AR 106),  
5 Dr. Hale (AR 129), Dr. Comrie (AR 125).

6 First, plaintiff argues that the ALJ failed to include into plaintiff’s RFC the  
7 “sedentary” limitation that Dr. Hale opined would be plaintiff’s working capacity. Dkt. 12,  
8 pp. 3–4.

9 Dr. Hale conducted a review of plaintiff’s medical records on the reconsideration  
10 level. AR 114-129. Explaining the RFC assigned to plaintiff, Dr. Hale wrote the  
11 following:

12 Light as opined at initial review. . by Norm Staley, MD on 09-28-19. . .  
13 Apparently, the claimant’s + HIV status and treatment were not considered  
14 in the initial determination. The claimant’s reported fatigue/lack of energy  
15 may well be explained by his HIV and side effects of treatment, in addition  
16 to his known other conditions. I agree with sedentary work capacity applied  
17 retroactively to initial and continued on recon.

18 AR 129.

19 In pertinent part, the ALJ included the following physical limitations in plaintiff’s  
20 RFC:  
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22 After careful consideration of the entire record, the undersigned finds that  
23 the claimant has the residual functional capacity to perform light work as  
24 defined in 20 CFR 404.1567(b) and 416.967(b) except they can  
25 occasionally climb ramps and stairs, but never ropes, ladders or scaffolds;  
they can occasionally balance, stoop, crouch, crawl, and kneel; they can sit  
6 hours and stand and/or walk 2 hours in an 8-hour day. . . .

26 To the extent that an ALJ accepts a physician’s opinion, they must incorporate  
27 the limitations contained in that opinion into the RFC. *See Magallanes v. Bowen*, 881

1 F.2d 747, 756 (9th Cir. 1989). When the RFC is incomplete, the hypothetical question  
2 presented to the vocational expert at step five is also incomplete, “and therefore the  
3 ALJ’s reliance on the vocational expert’s answers [is] improper.” *Hill v. Astrue*, 698 F.3d  
4 1153, 1162 (9th Cir. 2012).

5 Here, the ALJ accepted Dr. Hale’s opinion, but did not include his limitation that  
6 plaintiff is only capable of sedentary work. See AR 23. The Commissioner argues that  
7 Dr. Hale did not opine plaintiff would be limited to a sedentary level of work, and that the  
8 mention of “sedentary” in his opinion referred to plaintiff’s inability to perform the full  
9 range of light work. Dkt. 13, p. 5. To support this interpretation, the Commissioner points  
10 to the exertional limitations Dr. Hale assigned to plaintiff – occasionally lifting and/or  
11 carrying 20 pounds and frequently lift and/or carry 10 pounds. AR 127.

12 According to Social Security regulations, sedentary work involves “lifting no more  
13 than 10 pounds at a time and occasionally lifting or carrying articles like docket files,  
14 ledgers, and small tool,” while light work involves “lifting no more than 20 pounds at a  
15 time with frequent lifting or carrying of objective weighing up to 10 pounds.” See Social  
16 Security Ruling (“SSR”) 83-10. But the regulations further explain that “the primary  
17 difference between sedentary and most light jobs” is that light work “requires a good  
18 deal of walking or standing,” whereas sedentary jobs consist of a period of standing or  
19 walking no more than two hours within an eight-hour workday and sitting for a maximum  
20 of six hours within an eight-hour workday. *Id.*

21 In his opinion, Dr. Hale found that plaintiff could stand and/or walk for a total of  
22 two hours and sit for six hours in an eight-hour workday. AR 127-29. Dr. Hale’s  
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1 assessment of plaintiff's vocational factors also states that he found plaintiff's maximum  
2 sustained work capability is "SEDENTARY." AR 133.

3 Dr. Hale identified three occupations that plaintiff could perform: addresser, table  
4 worker, and dial marker. AR 133. Notably, these occupations are categorized as  
5 sedentary work. Dictionary of Occupational Titles ("DOT") 209.587-010, 1991 WL  
6 671797; DOT 739.687-182, 1991 WL 680217; DOT 729.684-018, 1991 WL 679720.

7 The record shows Dr. Hale's opined a sedentary work limitation for plaintiff. As  
8 the ALJ credited Dr. Hale's opinion, there is ambiguity in the record concerning the  
9 sedentary work limitation that Dr. Hale assigned to plaintiff.

10 Plaintiff also argues that the ALJ erred with the RFC determination by failing to  
11 incorporate the use of a cane. Dkt. 12, p. 7–8.

12 The opinions of Dr. Staley and Dr. Hale included exertional and postural  
13 limitations that indicated use of a cane. AR 105-06, 128. In explaining plaintiff's  
14 exertional limitation. Dr. Staley wrote: "antalgic gait favoring r hip and using cane." AR  
15 105. In explaining plaintiff's postural limitations, Dr. Staley and Dr. Hale both wrote: "l/s  
16 and bilat hop loss of motion; using cane with antalgic gait." AR 106, 128.

17 An error is harmless only if it is not prejudicial to the claimant or "inconsequential"  
18 to the ALJ's "ultimate nondisability determination." *Stout v. Comm'r Soc. Sec. Admin.*,  
19 454 F.3d 1050, 1055 (9th Cir. 2006).

20 The ALJ included postural restrictions in plaintiff's RFC—occasionally balancing,  
21 stooping, crouching, crawling, and kneeling—but did not mention that plaintiff is limited  
22 by the assistance of a cane. See AR 23. The ALJ credited the opinions of Dr. Staley  
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1 and Dr. Hale, yet they did not state that plaintiff required a cane; therefore the ALJ's  
2 failure to include a requirement for a cane in the RFC determination was harmless.

3 Plaintiff argues that the ALJ also erred with the RFC determination for failing to  
4 incorporate the mental limitations opined by Dr. Brown and Dr. Comrie. Dkt. 12, pp. 10–  
5 12; AR 89, 131.

6 The RFC does not include the *adaptation* limitations assigned by either doctor,  
7 both of whom the ALJ credited. AR 23. The limitations reflect only the understanding  
8 and memory, social interaction, and environmental limitations from the medical opinions  
9 of Dr. Brown (AR 88-89) and Dr. Comrie. AR 130-31. The ALJ's failure to include  
10 adaptation limitations into the RFC determination was error. *Hill v. Astrue*, 698 F.3d  
11 1153, 1162 (9th Cir. 2012).

12 The Commissioner argues the ALJ did not err, because an ALJ does not need to  
13 explicitly include the doctors' findings or narrative explanations verbatim, and that an  
14 ALJ can translate a medical source's findings into a "succinct RFC." Dkt. 13, p. 8, citing  
15 *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1005-06 (9th Cir. 2015). Although  
16 the ALJ considered all the mental limitations assigned by Dr. Brown and Dr. Comrie, the  
17 RFC does not include either an explicit reference or a "translation" of the adaptation  
18 limitations.

19 D. Whether the ALJ Erred At Step Five of the Sequential Evaluation

20 Plaintiff assigns several aspects of ALJ's findings at step five, but as discussed  
21 above, the Court has found that the ALJ erred with the RFC assessment and did not  
22 accurately include all of plaintiff's functional limitations relating to migraines; also, the  
23 ALJ did not consider adaptation limitations opined by Dr. Brown and Dr. Comrie. And,  
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1 there is ambiguity concerning Dr. Hale's opinion with respect to whether plaintiff's  
2 limitations cause him to be restricted to sedentary work. Therefore,  
3 the hypothetical question the ALJ posed does not completely and accurately describe  
4 plaintiff's functional capabilities. AR 66-69. Accordingly,  
5 the ALJ's step five determination which is based on the vocational expert's testimony  
6 cannot be upheld. *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012).

7 An error is harmless only if it is not prejudicial to the claimant or "inconsequential"  
8 to the ALJ's "ultimate nondisability determination." *Stout v. Comm'r Soc. Sec. Admin.*,  
9 454 F.3d 1050, 1055 (9th Cir. 2006). These errors potentially affect the hypotheticals  
10 provided to the VE, the record is uncertain and ambiguous, and therefore the errors  
11 would be consequential to the ALJ's decision regarding plaintiff's disability.

12 E. Remand With Instructions for Further Proceedings

13 "The decision whether to remand a case for additional evidence, or simply to  
14 award benefits[,] is within the discretion of the court." *Trevizo v. Berryhill*, 871 F.3d 664,  
15 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If  
16 an ALJ makes an error and the record is uncertain and ambiguous, the court should  
17 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045  
18 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy  
19 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d  
20 at 668.

21 The Ninth Circuit has developed a three-step analysis for determining when to  
22 remand for a direct award of benefits. Such remand is generally proper only where

23 "(1) the record has been fully developed and further administrative  
24 proceedings would serve no useful purpose; (2) the ALJ has failed to  
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1 provide legally sufficient reasons for rejecting evidence, whether claimant  
2 testimony or medical opinion; and (3) if the improperly discredited  
evidence were credited as true, the ALJ would be required to find the  
claimant disabled on remand.”

3 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.  
4 2014)).

5 The Ninth Circuit emphasized in *Leon v. Berryhill* that even when each element is  
6 satisfied, the district court still has discretion to remand for further proceedings or for  
7 award of benefits. 80 F.3d 1041, 1045 (9th Cir. 2017).

8 Here, the proper remedy is a remand for further proceedings.

9  
10 CONCLUSION

11 As discussed above, the ALJ harmfully erred in evaluating medical opinion  
12 evidence, and improperly evaluated plaintiff’s subjective symptom testimony about his  
13 migraine headaches. On remand, the ALJ is directed to re-evaluate the medical  
14 opinions and plaintiff’s statements, allow plaintiff to provide additional testimony and  
15 other evidence, as necessary to clarify the record.

16 Based on the foregoing discussion, the Court finds the ALJ erred when they  
17 determined plaintiff to be not disabled. Defendant’s decision to deny benefits therefore  
18 is REVERSED and this matter is REMANDED for further administrative proceedings.

19 Dated this 9th day of May, 2022.

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22 Theresa L. Fricke  
23 United States Magistrate Judge  
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